

Chapter 3

Gender: From Theory to Law

Abstract Gender came gradually but with increasing visibility into the law, with a considerable spread in the international legal sphere. Initially there is only the explicit reference to ‘sex’, in the general meaning of sexual identity, as an unjustified reason for discrimination, along with natural, ethnic, socio-economic conditions and political and religious opinions. In this context there emerges a general reference to ‘other status’ without further specification. The chapter reconstructs the so called ‘Gender Agenda’, giving a general view of the legal documents referring to ‘gender’, pointing out the ambiguity of its use and showing the practical implication of the theoretical discussions, with specific reference to intersexuality, transsexualism, transgender, homosexuality. From the Conference of Cairo and Beijing to the Yogyakarta Principles, from the European provisions (sentences and documents) to European legislations, there are widespread and recurrent expressions referring to ‘gender identity’ and ‘sexual orientation’, with meanings that go beyond the mere distinction between the biological dimension of sex and the social dimension of gender, to include the instances of postmodern theory.

Keywords Gender identity • Sexual orientation • Human rights • The Yogyakarta principles • Intersexuality • Transsexualism • Transgender • Homosexuality

3.1 Lines of International Declarations and Provisions

The gender category is not only object of abstract theorising. Gender is a reference that came gradually but with increasing visibility into the law, with a considerable spread in the international legal sphere. Initially there is only the explicit reference to ‘sex’, in the general meaning of sexual identity, as an unjustified reason for discrimination, along with natural, ethnic, socio-economic conditions and political

and religious opinions. In this context there emerges a general reference to ‘other status’ without further specification.¹

3.1.1 *From the Conference of Cairo and Beijing*

The introduction of the word ‘gender’ in substitution of the word ‘sex’ dates back to the *Conference of Cairo* (1994) and to the *Conference of Beijing* (1995) of the UN.² In documents prepared in this context the term ‘gender’ is often stated in different areas without an explicit semantic clarification and without a clarification of the difference between the biological dimension of sex and the socio-cultural dimension of gender, despite specific requests by certain States suspicious of the ambiguity. The sex/gender debate is introduced in the discussions during the conferences,³ from which different positions emerge. On the one hand the belief that gender is just a polite substitute for sex, regardless of the semantic background or the moderate perception of the distinction between social roles and biological condition.⁴ On the other hand, the awareness of the novelty of this category in the context of the modern and postmodern debate, which is expressed in the attempt by feminist and post-feminist guidelines to introduce it and defend it and the opposite attempt to eliminate it or ‘put it in brackets’ to highlight the ambiguity.⁵

¹ See UN, *The Universal Declaration of Human Rights* (1948): in art. 2 “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”; UN, *International Covenant of Civil and Political Rights* (1966): in art. 2.1. “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

² D. O’ LEARY, *The Gender Agenda. Redefining Equality*, Vital Issue Press, Lafayette (Louisiana) 1997. We may find some expressions as: gender equality, gender discrimination, gender relations, gender disparities, gender issues, gender perspectives, gender methodology, gender approach, gender policies.

³ Bella Azburg, President of the Woman’s Environment and Development Organization (WEDO), maintains that the current attempt to eliminate the word gender and to restore the word sex is ‘demeaning’ and ‘insulting’: it is an attempt to turn back the gains made by women, to intimidate and prevent future progress. She doesn’t want to go back to the concept of ‘biology is destiny’, reducing women to the biological dimension.

⁴ Selma Ashipala believes that the word should be used with the meaning given in the Platform for Action: “socially constructed roles, understood and expected by the men and women in society, as well as the responsibilities and opportunities for men and women from these roles” (*ibid.*).

⁵ Marta Casco, Head of the delegation of Honduras, asked for a precise definition of gender.

The debate shows the lack of agreement regarding the meaning of the concept, as well as the difficulty in translating the term.⁶

Dale O'Leary, in the reconstruction of the debate, stresses that the 'Gender Agenda' sails into communities not as a 'tall ship', but like a 'submarine' determined to reveal as little of itself as possible.⁷ The author hypothesises that the lack of transparent use of the category and its 'subtle' insertion might be fruit of a specific well-hidden programme, namely the idea of introducing in law not only a replacement term, but new instances that subvert certain traditional concepts such as maternity and family and the awareness that this disruption might not receive immediate approval.⁸

Subsequently, the gender category tends to assume greater visibility in international documents and has recently acquired a precise and explicit semantic value. There are widespread and recurrent expressions using gender identity and sexual orientation,⁹ with meanings that go well beyond the mere distinction between the biological dimension of sex and the social dimension of gender, to include the instances described in postmodern theory.

The Latin American and Caribbean Committee for the Defence of Women's Rights (CLADEM) in a *Declarations of Human Rights from a Gender Perspective* (1998) criticises the formulation of the doctrine of human rights as an historical expression of a western, white, adult, heterosexual male, without any considerations for women, ethnical groups, homosexuals, gay, and proposes the formulation and recognition of the 'right to freedom in sexual orientation and gender identity'.

⁶ There is consolidation of the use of gender as a non-biological concept (as opposed to sex) but socially constructed, with reference to the influences of culture, the variability in time and the mutability in space of roles, behaviours, personality traits. More recently, the UN and its agencies have adopted a number of definitions of gender that include elements such as social construction and the variability of the concept in history and society, indicating with gender the roles assigned (and the value attributed to them) to women and men in different cultures. As regards the relation between gender and sex, some definitions emphasise the opposition between sex as a static category and gender as a dynamic one. Some of the definitions of the United Nations do not refer to sex or to the biological element, but focus exclusively on the social construction of gender. The United Nations Development Fund for Women, UNDP, the ILO Labour Organization, the Joint United Nations Programme on HIV/AIDS welcome this approach.

⁷ D. O' LEARY, *The Gender Agenda. Redefining Equality*, cit. The author demonstrates how 'gender mainstreaming' is a program that the UN asked to incorporate in all commissions, agencies, intergovernmental bodies, consultants, intergovernmental organisations. Cf. G. KUBY, *Die Gender Revolution. Relativismus in Aktion*, Fe-medienverlag GmbH, Kisslegg 2007.

⁸ H. PIETILA, *Engendering the Global Agenda. The Story of Women and the United Nations*, Development dossier, NGLS, 2002.

⁹ J. JONES, A. GREAR, R.A. FENTON, K. STEVENSON, *Gender, Sexualities and Law*, Routledge, Oxford 2011.

3.1.2 *The Yogyakarta Principles*

This line is evident in the declaration of a group of experts on human rights known as the Yogyakarta Principles or *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity: the Yogyakarta Principles* (Geneva, 26 March 2007). The text explains the significance of respect, protection and the realisation of human rights in relation to gender identity and sexual orientation developing and enunciating the reference principles in an articulated manner. These principles intend to draw the attention of institutions and governmental and non-governmental international organisations, but above all to recommend and compel States to direct legislation, jurisprudence and doctrine on the subject.¹⁰ The issue of gender identity and sexual orientation had been treated occasionally and marginally, in a vague and imprecise manner, and sometimes in an inappropriate, if not erroneous manner, confusing the issue of male/female discrimination, with the discrimination of transsexuals, transgender, intersexuals, lesbians, gays and bisexuals. The intent of the document is clarification by the introduction of a systematic and detailed reflection in the sphere of international law both on a theoretical and practical level.¹¹

In the introduction to the Yogyakarta Principles the definitions of sexual orientation and gender identity are apprehended. Sexual orientation¹² is defined as <<a person's capacity for profound emotional, affectional and sexual attraction to, (as well as intimate and sexual relations with) individuals of a different gender, of the same gender, or more than one gender>>.¹³ Gender identity is <<understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other

¹⁰ For a comment on the text cf. M.O'FLAHERTY, J. FISHER, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, "Human Rights Law Review", 2008, 8, 2, pp. 207–248. The *Jurisprudential Annotation to the Yogyakarta Principles* (November 2007) has also been published: it reconstructs the different jurisprudential interpretations of principles in several States.

¹¹ As introduced by Louise Arbour in *International Conference on Lesbian, Gay, Bisexual, and Transgender Rights*, Montreal, 26 July 2006: *Statement of the Office of the UN High Commissioner for Human Rights* (M. O'FLAHERTY, J. FISHER, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, cit., p. 232). This indication has subsequently been developed in the International Commission of Jurists, *Sexual Orientation and Gender Identity in Human Rights Law. References to Jurisprudence and Doctrine of the Inter-American System* (July 2007); International Commission of Jurists, *Sexual Orientation and Gender Identity in Human Rights Law, Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union* (October 2007). The International Service for Human Rights has also contributed to this elaboration.

¹² The expressions 'sexual preferences' and 'sexual minorities' are also used.

¹³ *The Yogyakarta Principles*, pp. 7–8.

expressions of gender, including dress, speech and mannerisms>>.¹⁴ These definitions are a reference point in subsequent documents.

The aim of the text is the implementation of regulations to protect these rights and the promotion of a culture which increases the growth of social awareness against transphobia and homophobia, to fight all forms of exclusion, stigmatisation and hatred against individuals on the basis of sexual choice. It indicates in particular: the right not to undergo sex reassignment and to be recognised even in legal documents as intersex or transgender, the right to life, privacy, freedom of thought and public action, economic and social rights (in employment, housing, education, health and safety), the right to a family and to have children, with access to adoption and reproductive technologies. There are many States that have adhered; there are also many critical reactions that highlight the non-binding nature of such statements and recommendations, not being the product of negotiations and agreements. The reasons for non-acceptance of this document are based on the detection of the threat to family, freedom of speech and religious freedom, national sovereignty and democratic institutions, as part of the reference to instances of natural law.¹⁵

3.1.3 Other Documents

There is also the UN document *Declaration on Sexual Orientation and Gender Identity* (2008). With a reference to a document of the Organization of American States adopted in the same year and which bears the same name,¹⁶ the principle of non-discrimination extended to sexual orientation and gender identity is asserted, the expression of concern at acts of violence against individuals because of their sexual choices, along with a specific request that the Human Rights Council agenda should include discussion of the issue in the hope that Member States will defend these appeals by regulatory action.

The Commissioner for Human Rights prepared a document *Human Rights and Gender Identity* (29 July 2009), highlighting specific issues, offering suggestions and drawing attention to problems in order to inform the authorities and the members of governmental and non-governmental organisations, as well as the public regarding aspects of the debate. In particular, it highlights the fact that gender identity is always treated together with sexual orientation, despite their

¹⁴ *Ibid.*, p. 6 and 8.

¹⁵ There have been critical reactions from the Catholic Family and Human Rights Institute, P.A. Tozzi, *Six Problems with the Yogyakarta Principles*, 13 April 2007 (International Organization Research Group, Briefing Paper, number 1, 2 April 2007), Downs, State of America, 9 November 2007.

¹⁶ *UN Declaration on Sexual Orientation and Gender Identity*, 2008.

being separate issues. The document specifically addresses the problems of intersex, transsexual and transgender people, also including transvestites, underlining their right to life, personal integrity and health. It is clarified that the term gender indicates the individual's inner experience that may not match the sex of their body and their own mode of expression (dress, language, behaviour). The document, in the context of EU directives, calls for revision of the gender directives¹⁷ (dedicated to male/female difference) to include specifically gender identity. The study highlights how the condition of transgender individuals in Europe as regards the perspective of human rights is not positive and recalls the Yogyakarta Principles for the implementation of legislation, with particular attention to protection from transphobia, transparent procedures for the change of name and sex in documents, the abolition of compulsory treatment and sterilisation, the accessibility of medical, surgical, hormonal and aesthetic treatment of psychological support within the public sector, the guarantee of the possibility to stay in the family of origin even after the sex change, the sanction of discrimination in employment, the promotion of education for acceptance and tolerance.

The Committee on Economic, Social and Cultural Rights in General Comment no. 20 *Non-Discrimination in Economic, Social and Cultural Rights* (Geneva, 4–22 May 2009, art. 2, paragraph 2) cites discrimination on the grounds of race, sex, language, religion, political opinion, national or social origin, property, birth. It introduces the distinction between sex (referred to physiological characteristics) and gender in the sense of “stereotypes, prejudices and expected roles” that can hinder rights, this reference is explicitly stated in the discrimination of women in pregnancy and maternity in the workplace. In the context of the reference to ‘other states’ the document refers to the disability, age, nationality, family status, health status, place of residence, socio-economic situation. It explicitly refers to sexual orientation and gender identity, recommending to States that sexual orientation should not be an obstacle to the realisation of rights and that gender identity should be recognised among the ‘prohibited grounds of discrimination’.

Lastly, mention should be made to the UN *Convention on the Rights of Persons with Disabilities* (2008). In the context of the fight against historical, economic, social, psychological, and political obstacles, so as to affirm and promote the rights of persons with disabilities, gender is mentioned several times, precisely in the *Preamble* (letter s), in some articles (art. 16, paragraphs 1, 2 and 4, art. 34, paragraph 4 and art. 25, point a), relating to health care and programs that should include the area of sexual and reproductive health. Many documents are critical and expose the ‘ambiguities’ of the term gender, calling for its replacement with the word sex, explaining that the term gender means sexual difference.

¹⁷ Council of Europe, Directive 2004/113/EC and Directive 2006/54/EC.

3.2 Lines of European Regulations

3.2.1 Provisions

Even in community regulations there is increasingly precise, clear and articulate thematisation of the gender issue.

The Council of Europe in the *European Convention on Human Rights* (1950) explicitly recognizes rights and freedoms without distinction as to sex, race, colour, language, religion, political or other opinion, national or social origin, membership of a national minority, property, birth or other status (art. 14) and refers to the right to respect for private and family life (art. 8).

The European Union under the *Treaty of Amsterdam* (1999) and the *Treaty of Lisbon* (2007) explicitly introduces (art. 19, ex art. 13) sexual orientation as a category not to be discriminated along with sex, race or ethnic origin, religion or belief, disability and age. The *Charter of Fundamental Rights* (Nice 2000) in addition to the principle of non-discrimination because of sexual orientation (art. 21), recognises the right to marry and start a family without specifying whether between a man and a woman, leaving open the possibility of recognition of marriage for same-sex couples (art. 9).

Many Resolutions of the European Parliament and the Council of Europe deal indirectly and directly with the principle of equal treatment irrespective of sexual orientation. As part of the general principle of ‘gender mainstreaming’ along with the question of male/female equality, there is also the question of gender identity and sexual orientation. There are two main lines in the recognition of non-discrimination: the criminalisation of homophobia and transphobia as an irrational hatred of homosexuals and transgender people based on prejudice, like racism, xenophobia, antisemitism and sexism and the recognition of unions also marital, as well as access to reproductive technologies and adoption.

The *Recommendation on Condition of Transsexuals* (No. 1117 of 1989) and the Council of Europe *Resolution on Discrimination against Transsexuals* (No. 1117 of 1989) of the European Parliament explicitly speak of sexual identity, but make no reference to gender identity. The European Parliament in its *Resolution on Equal Rights for Homosexuals* (A3-0028/1994)¹⁸ reiterates that every citizen should have the same treatment regardless of sexual orientation; it calls for the abolition of all laws which criminalise and discriminate against sexual relations between persons of the same sex and the elimination of obstacles to marriage or registered unions of homosexual couples, as well as access to adoption and foster care. In the *Directive Establishing a General Framework for Equal Treatment in Employment and Occupation* (2000/78/EC), the European Parliament and Council of Europe set out the general principle of ‘gender mainstreaming’ (with reference to the male/female difference) and the prohibition of discrimination on the grounds

¹⁸ Preceded by *Resolution on Sexual Discrimination at Work* (1984).

of sexual orientation is repeated, along with discrimination for religious belief, disability and age.¹⁹ This reference is included in the *Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation* (2006), which speaks of gender equality, gender mainstreaming and ‘integration of the gender dimension’, but also of ‘gender segregation’ as ‘sexual discrimination’. The non-discrimination extends to people who have reassigned gender, therefore transsexuals.

The European Parliament resolutions on homophobia (*Resolution on Homophobia in Europe* (2006), *Resolution on the Increase in Racist and Homophobic Violence* (2006), *Resolution on Homophobia in Europe* (2007)²⁰ introduce the reference to homophobia as an irrational hatred against homosexuals, and also transsexuals (transphobia) based on prejudice; it expresses a firm condemnation of any discrimination based on sexual orientation and gender identity. The European Commission *Proposal for a Directive on the Application of the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age and Sexual Orientation* (2008) explains and reaffirms non-discrimination on the basis of sexual choices.²¹ The Committee of Ministers to Member States, *Recommendation on Measures to Combat Discrimination Motivated by Sexual Orientation and Gender Identity* (2010) recommends to adopt legislative measures to implement effectively the fight against discrimination on grounds of sexual orientation and gender identity and ensure respect for human rights to gays, bisexual, transgender, promote tolerance, hoping for appropriate sanctions for discriminatory acts and measures to compensate victims.

Recently, the Parliamentary Assembly with its *Resolution on Discrimination on Grounds of Sexual Orientation and Gender Identity* (n. 1728, 2010) reaffirms the fundamental rights of LGBT people to life, safety, freedom, and recommends to adopt and implement anti-discrimination legislation, and urges to sign and ratify Protocol 12 of the European Convention on Human Rights, which prohibits discrimination in general, provides legal recognition of same-sex couples by recognising the parental responsibilities and interests of children, ensuring identity and security, and calls for the recording in official documents of ‘preferred gender identity’ with no obligation to undergo sterilisation or medical procedures for surgical and/or hormonal sex reassignment. It reiterates the importance of equality of access to services without bias, ensuring a dialogue between the institutions and the LGBT community. The *Recommendation on Discrimination on Basis of Sexual*

¹⁹ In particular, in the premises in paragraphs 11, 12, 23, 26, 29, 31 and in articles. 1, 2 (6), 6. See also Directive 2000/43/EC on racial equality than explicit protection against discrimination for reasons of race and ethnicity in social life (work, education, social security, health care).

²⁰ For the period 2007–2013 the European Commission, in the PROGRESS programme (Programme for Employment and Social Solidarity) includes gender among the issues of non-discrimination.

²¹ The Parliamentary Assembly has adopted several recommendations on homosexuals (1981), on asylum and immigration for gays and lesbians (2000), on the condition of lesbians and gay people in Europe (2003).

Orientation (No. 1915, 2010) proposes to implement the tools of tolerance so as to promote acceptance of non-discrimination.

3.2.2 Sentences and Documents

In the sphere of community jurisprudence, there are many cases reported in international documents on gender issues. Some sentences have gradually recognised certain rights to transsexuals and transgender to insurance coverage for operations for body modification, registration in identity documents, privacy, marriage, social security and some rights of homosexuals, in particular the right to adopt. There are many studies on these issues on a sociological and normative level with the aim of increasing critical awareness of the question, fighting prejudice and discrimination.

The European Court of Human Rights (ECHR) in the period 1986–1998 did not recognise the right to marry to post-operative transsexuals, due to the uncertainty of the nature of transsexualism and because of the differences within various States regarding legal recognition of the new gender,²² it tolerated the refusal of States to recognize the new gender, acknowledging marriage in the context of the traditional family.²³ It is worth recalling some sentences—without any claim of completeness—that have changed this direction: the case of *Van Kück v. Germany* (12 June 2003) where it is stressed that the medical treatment of transgender people should be covered by insurance; the case of *Christine Goodwin v. The United Kingdom* (11 July 2002) where there is recognition of the possibility of recording sex change in ID documents, claiming the right to gender identity in the sense of conformation of sexuality to individual choice (with or without surgery); the case of *L. v. Lithuania* (11 September 2007) where the privacy rights of transsexuals are recognized, the case *Schlumpf v. Switzerland* (8 January 2009) against the refusal of an insurance company to pay for medical treatment for sex reassignment; the case of *E.B v. France* (22 January 2008) where a single homosexual was not granted the right to adoption because of sexual orientation; recently in the case of *Schalk and Kopf v. Austria* (24 June 2010), the Court held that the refusal of the Austrian authorities of recognition of same-sex marriage does not violate art. 12 of the European Convention on Human Rights, which refers to the heterosexual family: the Court interpreted that provision to be neither an obligation nor a ban on legal recognition of same-sex marriage, rather a permission, believing it possible to recognise homosexual unions as civil unions.

²² *Rees v. The United Kingdom* (17 October 1986); *Cossey v. The United Kingdom* (27 September 1990); *B. v. France* (23 March 1992); *X, Y and Z v. The United Kingdom* (22 April 1997).

²³ *Sheffield and Horsham v. The United Kingdom* (30 July 1998). It should be recalled that the Court held that the prohibition of homosexual relations is a violation of privacy.

The European Court of Justice in the case of *P. v. S. and Cornwall County Council* (30 April 1996), stating that any different treatment with respect to sexual orientation requires particularly serious reasons, seemed to include gay rights in the context of discrimination on the basis of sex (in this sentence transphobic discrimination was considered as a 'sex discrimination' for the purposes of EU law). If in the case of *Grant* (17 February 1998) it does not believe it should extend the prohibition of discrimination on the basis of sex to discrimination against same-sex couples, in the case of *K.B. v. NHS Pensions Agency* (7 January 2004) it argues that transsexuals should be able to marry and acquire related rights otherwise they would be disadvantaged compared to heterosexual couples. In the case of *Sarah Margaret Richards v. Secretary of State for Work and Pensions* (27 April 2006) it recognises the right to a transsexual to a pension as a woman though born as a man, believing that social security should be extended to transsexuals; in the case of *Tadao Maruko vs. VdB* (1 April 2008) it finds a violation of the principle of non-discrimination by German legislation which does not include the right to survivor's pension in the regulation of same-sex civil unions; in the case of *Jürgen Römer v. City of Hamburg* (10 April 2008) it raises the question of treatment in employment law for same-sex couples, the attorney general calls for equal treatment of homosexual couples and heterosexual couples in the European Union countries, believing that "unequal treatment to the detriment of the people connected to this type of union is a source of discrimination based on sexual orientation".

There have been many studies carried out in this area. The Committee of Ministers of 2 July 2008 decided to take some action against discrimination based on sexual orientation and gender identity. It established an Intergovernmental Expert Group with the task of preparing a recommendation for the 47 Member States of the Council of Europe. On behalf of the European Parliament, the EU Agency for Fundamental Rights has produced a legal and social report on homophobia and discrimination on the grounds of sexual orientation in European Union countries.²⁴ In this document it is evident that there are no reasons not to extend protection from discrimination to transvestites, to those who live permanently in the opposite sex whether they have undergone medical intervention (transsexuals), either partially or not at all (transgender). This is a wide and articulated sociological and legal analysis (legislative and jurisprudential) compared with an analysis in the context of social discrimination, with reference to employment, freedom of movement, asylum, family reunification, freedom of assembly and speech. The report notes that the sociological analysis is incomplete, given that the stigma is still persistent and the clandestine nature of the phenomenon.

As part of the Parliamentary Assembly, Committee on Legal Affairs and Human Rights, A. Gross has developed a Report on *Discrimination on the Basis of*

²⁴ European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States*, part I legal and part II social (2008).

Sexual Orientation and Gender Identity (doc. 12185, 23 March 2010) which analyzes the current situation at an international level, aiming to increase critical awareness of the issue, fight prejudice and discrimination, protecting the LGBT community from violence, restriction of freedom of expression and assembly, and to guarantee the right to privacy and family, access to education, employment and health services. In this report the definition of sexual orientation and gender identity explicitly refers to the Yogyakarta principles; it only adds the specific demarcation of sexual orientation in relation to heterosexuality, homosexuality and bisexuality. The text also introduces some definitions: the definition of transgender or trans-people as “people who have a gender identity that differs from the gender assigned at birth and people who want to describe their gender identity in a different way from the gender assigned at birth; it includes people who feel they have to, prefer to or choose to (whether by clothing, accessories, cosmetics, or body modification) present themselves differently from the expectations of the gender role assigned to them at birth”. The definition of transsexual as a person who “prefers another gender than their birth gender and feels the need to undergo physical alterations to the body to express this feeling such as hormone treatment and/or surgery”. The report stresses the need for explicit recognition of the protection of life, security, personal integrity and dignity of the LGBT community, the legitimacy of the change of name and gender without the need for medical treatment as a precondition, with subsequent recognition of legal status. The document describes the prejudice against homosexuality and argues its unacceptability, estimating that ‘alternative forms of family’ are on the increase.

3.3 A Look at European Legislations

As regards the laws of the States in Europe, there is extreme heterogeneity. The protection of gender identity is not easy to analyse, as it is an expression that is not explicitly provided for in many laws.²⁵

With regard to transgender people who openly declare their gender identity heterogeneous situations are delineated. In some countries (Belgium, Denmark, France, Ireland, Italy, Latvia, Netherlands, Austria, Poland, Slovakia, Finland and the UK) this is considered a form of sex discrimination, without explicit legislation that provides protection as a category, assigning any assessments to the competent bodies or courts, with particular reference to employment and access to goods and services. In other countries (Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia), transgender discrimination is not considered as sex discrimination nor discrimination based on sexual orientation. In few Member States (Germany, Spain) the issue is treated as

²⁵ This reconstruction is based on the general lines of the Report *Discrimination on the Basis of Sexual Orientation and Gender Identity*, 2010.

discrimination based on sexual orientation. In others there exists a specific foundation for discrimination: in Hungary they speak of 'sexual identity', in Sweden of 'transgender identity or expression'.

As regards, specifically, the recognition of the right to change sex and gender reassignment, with recognition of legal status and name change and the ability to marry the opposite sex, there is divergent legislation. Few countries have no regulation.²⁶ In some countries transsexuals do not have legal recognition (Ireland, Luxembourg, Latvia, Malta). In some countries they are offered recognition if they cancel their marriage, sometimes this is even against the subject's will (especially if they have children).²⁷ This condition is introduced in countries where same-sex marriage is not allowed. In Europe, the regulations generally impose restrictive conditions (period of observation, medical and psychological assessment, court order)²⁸ in view of protecting people considered to be in vulnerable circumstances. In Italy and Poland surgical treatment is a requirement.²⁹ For other countries medical hormonal treatment is necessary and sufficient (Belgium,³⁰ Germany, Estonia, Holland). Some countries (Ireland, Luxembourg, Latvia and Malta) do not yet legally recognise gender change.

Two paths are emerging. The so-called 'small solution' (foreseen in Germany³¹), where in registry records the change of name is allowed even without the carrying out of surgical treatment; and the so-called 'major solution', where in registry records not only is the change of name allowed but also change of sex, without surgical modification of the body, after having lived consistently with the chosen gender for two years and with medical certification of gender dysphoria.

This is the path followed by English and Spanish legislation. In England the *Gender Recognition Act* (2004) allows correction of birth certificates with reference to name and sex, issued by the Gender Recognition Register. Spain has approved the *Law on the Modification of Sex in Civil Registers* (2007) acknowledging the change of name and sex in registers when these do not match gender identity for the free growth of personality: it is sufficient to be of age, undergo hormone treatment, and have a psychologist's certificate that highlights the incompatibility experienced between biological sex and gender. In March 2009, the Spanish Ministry of Defence repealed the requirement to have male anatomy in order to enter male departments: male or female uniform is not worn on the basis of sex, but on the basis of the identity written on the document.

²⁶ Bulgaria and Latvia.

²⁷ There is debate about what is the best interest of the child.

²⁸ In some countries there is no repayment of the national health service, and it is considered a practical deterrent.

²⁹ Poland has no specific legislation, but recognises the right to legally change sex.

³⁰ Belgium has issued an *Act on Transsexualism* (2007) with the modification of articles 62bis-62ter in the Civil Code.

³¹ In Germany there is a law *Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen* (1980) that allows the change of name and gender in specific cases.

No law—to date—explicitly recognises the existence of a neutral gender,³² it is not possible for a subject (who is intersex or asexual) not to be assigned to either gender or to both. Instead there has been a request to extend the protection granted to transsexuals also to transvestites and transgender.³³ The debate on access to health services remains open. Some think it better for the transgender condition to be classified as a disease or disorder³⁴ because it guarantees access to medical and healthcare treatment (but not aesthetic treatment or secondary care); others believe that this increases stigma.

With regard to the regulations on homosexuality, it has been decriminalised by all countries in Europe.

In some States there is discussion concerning the possibility of including the aggravating circumstance of homophobic and transphobic acts.³⁵

‘Hate crimes’ are starting to be configured with reference to a physical or verbal attack against an individual, motivated by prejudice against him or her because of sexual orientation. In all Member States currently physical aggression is a crime and in most Member States the punishment for these crimes can be increased if they are motivated by prejudice, for example, against race or religion (in these cases we speak of aggravation). Community legislation does not require Member States to include homophobia or transphobia among the aggravating factors of criminal offenses. Many countries in Europe have provisions for homophobia as discrimination on grounds of sexual orientation (Belgium, Denmark, Germany, Estonia, Spain, France, Lithuania, Netherlands, Portugal, Romania, Sweden, Northern Ireland, Scotland). In some countries even hate speeches against groups are punished: although there is no explicit reference to LGBT their inclusion is intended (Cyprus, Czechoslovakia, Finland, Hungary, Luxembourg, Poland, Slovakia). The regulations in Austria, Bulgaria and Malta are however interpreted broadly. Some countries have hatred on grounds of sexual orientation as an aggravating circumstance of the offense (Belgium, Denmark, Spain, France, Holland, Portugal, Romania, Finland, Sweden, England).

³² This is the direction taken in *Transgendergesetz* (draft law in Germany 2000), which included ‘IS’ intersex status alongside M (male) and F (female).

³³ S. WHITTLE, L. TURNER, M. AL-ALAMI. (2007) *Engendered Penalties: Transgender and Transsexual People’s Experiences of Inequality and Discrimination* (A Research Project and Report commissioned by the Equalities Review) p. 74.

³⁴ *Diagnostic and Statistical Manual of Mental Disorders* speaks of ‘gender identity disorder’ as ‘mental health disorder’; the International Statistical Classification of Diseases and Related Health Problems of the WHO speak of ‘mental and behavioural disorders’. These definitions are widely used in Europe.

³⁵ In Italy, lively discussion has focused on this area. Proposals have been put forward for a modification of the law on transsexualism in order to recognize the possibility of not changing the body, while living according to the opposite gender to one’s sex. There is discussion on the possibility of including the aggravating circumstance for crimes of homophobia and transphobia, and on whether there should be recognition of unions, records or marriage between homosexuals.

As is known, there are many laws that recognise civil unions or marriage, in various forms, between homosexuals. As well as the possibility of adoption and access to assisted procreation.

The countries—among the Member States of the Council of Europe—which have a law recognizing same-sex marriage are: Netherlands (2001), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010). Other countries have civil unions, also known as registered cohabitation or partnership, which guarantees rights and obligations also to same-sex couples in a way that is substantially equivalent to married couples: Denmark (1989), Germany (2001), Finland (2002), United Kingdom (2005), Switzerland (2007). In France (1999), Slovenia (2005), Andorra (2005), Czech Republic (2006), Hungary (2007) and Luxembourg (2004) granting an inferior status compared to married heterosexual couples. In other countries there is recognition of cohabitation but not a formal record of partnership: Croatia (2003), Ireland (2010), Austria (2010).³⁶

Adoption by same-sex couples is legal in the United Kingdom, Spain, Sweden, Belgium, Holland, Iceland. Germany, Norway, Denmark and Finland allow ‘stepchild’ adoption, which permits to adopt biological (or adopted) children had by a partner from a previous marriage or union. In Ireland and France, both homosexual and heterosexual singles, can make an adoption request. Other countries have chosen to legalise civil unions with unregistered cohabitation, in which certain rights and duties are acquired automatically after a specified period of cohabitation. Unregistered cohabitation is applied, almost exclusively, to heterosexual unmarried couples.

³⁶ There is a lack of recognition in: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Georgia, Greece, Italy, Latvia, Lichtenstein, Lithuania, Malta, Moldova, Monaco, Montenegro, Poland, Romania, Russian Federation, San Marino, Serbia, Slovakia, Macedonia, Turkey, Ukraine.